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No. 952

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CHARLES ELMORE ORFLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM 1943

In the Matter

—of—

PATIO CAFE, INC.,

Bankrupt.

EMPIRE STATE CHAIR CO., INC.,

Petitioner,

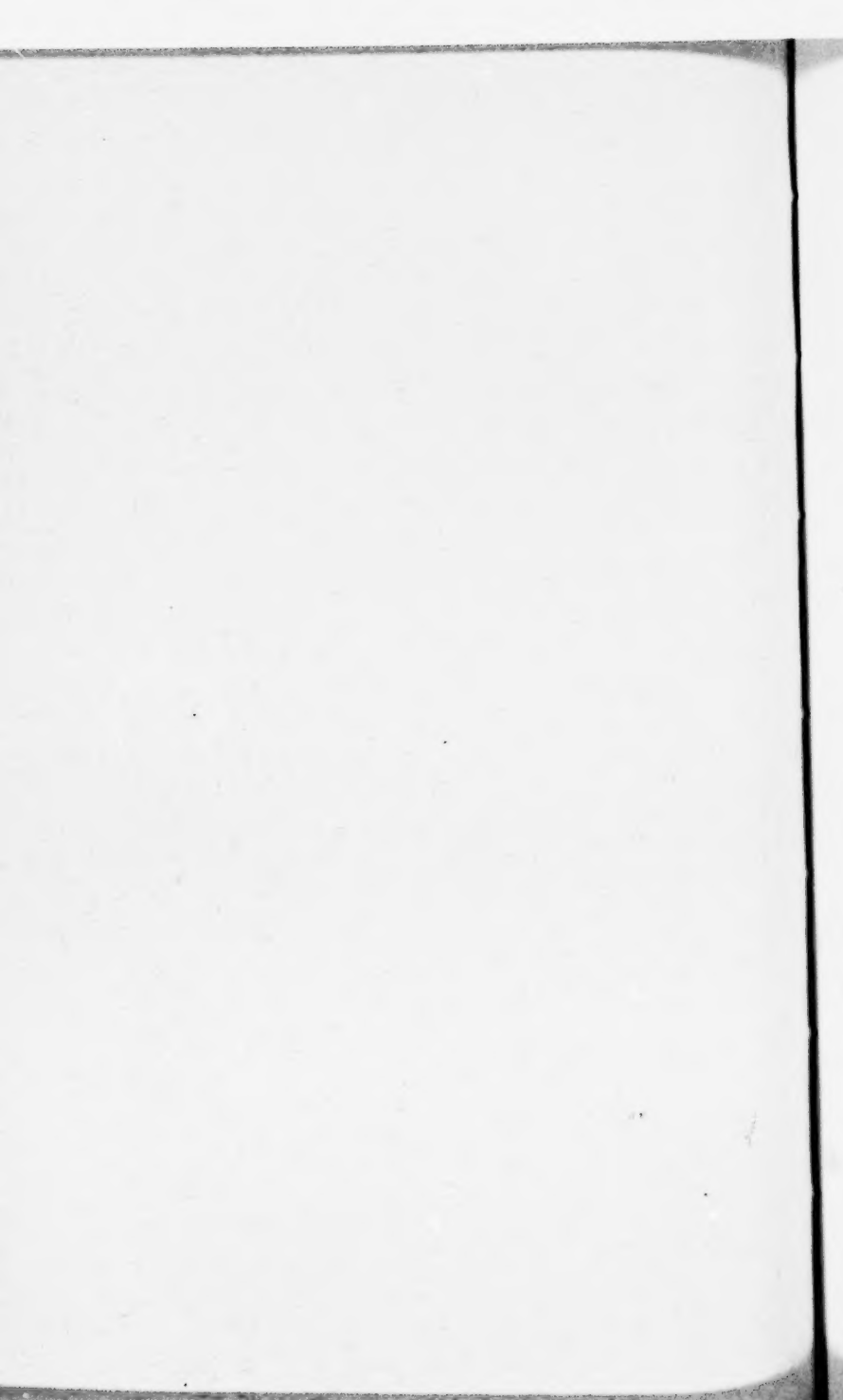
—against—

GEORGE J. BELDOCK, Trustee in Bankruptcy,

Respondent.

PETITION FOR WRIT OF CERTIORARI

HAROLD FORSTENZER,
Attorney for Petitioner,
401 Broadway,
New York City.



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PATIO CAFE, INC.,

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EMPIRE STATE CHAIR CO., INC.,

Petitioner,
(Appellee below)

—against—

GEORGE J. BELDOCK, Trustee in Bankruptcy,

Respondent,
(Appellant below)

**PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT**

*To the Honorable, the Chief Justice of the United States
and the Associate Justices of the Supreme Court of the
United States:*

The Empire State Chair Co., Inc., prays that a Writ of
Certiorari issue to review the decree of the United States
Circuit Court of Appeals for the Second Circuit entered

in the above entitled proceeding on the 28th day of February, 1944.

By its decree the Circuit Court of Appeals for the Second Circuit reversed an order entered in the United States District Court for the Eastern District of New York granting the petition of the Empire State Chair Co., Inc. to reclaim certain chattels sold under a conditional sales agreement by the petitioner herein to the bankrupt herein and the said Circuit Court of Appeals remanded the proceeding to the District Court with instructions to dismiss the petition.

Opinions Below.

This is a réclamation proceeding which first came on to be heard before a Referee in bankruptcy, Hon. Wilmot T. Morehouse, whose opinion is contained in the report which he filed in the United States District Court for the Eastern District of New York and which appears on pages 39 to 43, inclusive, of the record.

The Referee's report was confirmed, without opinion, by Hon. Matthew T. Abruzzo, whose order appears on pages 46 and 47 of the record.

The trustee in bankruptcy herein thereupon appealed to the Circuit Court of Appeals for the Second Circuit which, after argument, rendered its opinion (pp. 60 to 64 inclusive) and entered the decree heretofore described. The said opinion is reported in 140 F. (2d) 587.

Jurisdiction.

The judgment of the Circuit Court was entered on February 28, 1944. The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. A. Title 28, Section 347).

Questions Presented.

1. The questions presented for decision are vitally important. There is no precedent in the State of New York covering this set of facts and the Circuit Court predicated its decision primarily upon the Pennsylvania case of *In Re: Mineral Lac Paint Co.* (D. C. E. D. Pa.), 17 Fed. Supp. 1, affirmed sub nom. *Salkind v. Dubois*, 3 Cir., 105 Fed. 2nd 640. That case was decided under the Pennsylvania statute covering conditional sales agreements.

In contradiction thereto is the decision of the Court in the State of Washington in the case of *Diamond Iron Works v. Werley*, 135 Wash. 228; 237 Pac. 313.

In the Washington case the facts are practically identical with those of the case at bar. There also the conditional sales agreement referred to "plans and specifications annexed hereto" which were not filed with the filed copy. The statutes of the State of Washington, just like the statutes of the State of New York covering conditional sales agreements, do not require any description of the chattels involved.

In that case the Court held that the reference in the filed agreement to " * * * plans and specifications * * * " were sufficient and from the description in the filed copy the property could be identified by resorting to inquiries which an examination of the instrument would suggest.

The Pennsylvania statute on the other hand contains a specific requirement that a description of the chattels must be incorporated in the conditional sales agreement.

The first question therefore is whether the decision of the Circuit Court for the Second Circuit was proper in view of the differences between the statutes in Pennsylvania and New York.

2. Is a conditional sales agreement which suggests a course of inquiry and contains a key to the description of

the chattels involved valid against the vendee's trustee in bankruptcy in the State of New York when the specifications, containing a detailed description of said chattel which are referred to in the agreement, were not annexed to the copy of the agreement filed?

3. Is a conditional vendor's lien invalidated under the law of the State of New York by reason of the failure of the agreement to contain a description of the chattels involved in the filed instrument?

4. Will a Court of equity, and more particularly, one in the State of New York, penalize a conditional vendor for failing to include in the filed agreement the plans and specifications which were annexed to the original agreement but were omitted from the filed copy?

Statute Involved.

The statute involved is the Personal Property Law of the State of New York, with particular reference to the Sections therein contained covering conditional sales agreements to wit: Sections 60 to 80 (i) inclusive.

Statement.

On the 24th day of June, 1942 the bankrupt herein entered into an agreement with the petitioner, which agreement was prepared by the attorney for the bankrupt, in which the petitioner herein agreed to alter premises #630 Flatbush Avenue, Brooklyn, and equip the same as a restaurant, bar and grill.

This necessitated the building and equipment of the entire premises with the exception of the outer walls and the roof.

The agreement provided, in Paragraph 3 thereof, that the title to the chattels and fixtures installed shall remain in

the petitioner until the full sum of \$24,500. shall have been paid and provided for a method of installment payments thereon. The petitioner completed this work and the installation of all of the chattels and fixtures on the 20th day of April, 1942.

Up to that time, of course, no business could be done in the premises,—they were not erected or completed. On that date the petitioner herein turned over to the bankrupt's officers the key to the premises, gave the bankrupt possession of the chattels and fixtures and at the same time and on the same day filed in the office of the Register of the County of Kings (the office designated by the Statute of the State of New York) a copy of said agreement.

The agreement states, in paragraph One, that the contractor (the petitioner), shall and will provide all the materials and perform all the work for the owner (the bankrupt), as shown on the plans and described in the specifications which "are annexed hereto and which are identified by the signature of the parties hereto and become hereby a part of this contract".

In filing this document in the Register's office, a copy was filed which did not have annexed thereto a copy of the plans and specifications therein referred to.

The original agreement containing the plans and specifications initialed and signed by the parties thereto were received in evidence at the hearing before the Referee.

There is no provision in the statutes of the State of New York requiring that a description of the chattels be incorporated in the conditional sales agreement excepting only, conditional sales agreements covering sales for \$1500. or less, of goods for any use other than a commercial or business use.

At the time of the filing of this conditional sales agreement there could have been no creditors of the bankrupt excepting only other conditional vendors of fixtures and appliances and the landlord of the premises.

That the filing of such conditional bill of sale constituted notice to all and sundry that there existed a lien against chattels and fixtures located in the premises for an unpaid balance of at least \$15,500. and a total possible sum of \$24,500.

Anyone familiar with the restaurant business would know that the amount of lien on such premises would cover practically everything situated therein.

At the time of the filing of the petition in bankruptcy herein there was a balance due to the petitioner herein from the bankrupt under said agreement the sum of \$14,027.60.

Specification of Errors To Be Urged.

1. The Court erred in failing to differentiate between the statutes relating to conditional sales agreements of the State of New York and those of Pennsylvania.

2. The Circuit Court erred in predicating its decision upon the statutes of the State of Pennsylvania which require a description of the chattels rather than upon the statutes of the State of New York which do not require a description in this or similar agreements.

3. The Circuit Court erred in failing to follow numerous decisions throughout the nation which hold that where the agreement contains "a key to the description" or "suggests a course of inquiry" that the agreement is valid and binding. These decisions have been rendered and are the prevailing law in jurisdictions where the statutes require a description and should certainly prevail in the State of New York where no description is required.

4. The Circuit Court erred in failing to exercise its powers of equity in favor of the petitioner herein.

Reasons for Granting Writ.

There has been no decision in the State of New York or in the United States District Courts in the State of New York covering this question.

There are decisions in other jurisdictions which on the face thereof appear to be conflicting. The Pennsylvania case of *In Re: Mineral Lac Paint Co.* (D. C. E. D. Pa.), 17 Fed. Supp. 1, affirmed sub nom. *Salkind v. Dubois*, 3 Cir., 105 Fed. 2nd 640, was decided under the Pennsylvania statute covering conditional sales agreements which require "a brief description of the goods".

The Circuit Court based its decision in the instant case on the decision of the Pennsylvania Court notwithstanding the fact that the New York statute differs fundamentally from that of Pennsylvania, in that, the New York statute requires no description.

When the Uniform Conditional Sales Act was adopted by some of the states they enacted statutes substantially in accord with the provisions thereof, but in many instances the statutes of the various states differed in some respect from each other.

It is well established that Federal Courts must apply the law of the State which is the situs of the transaction.

A reading of the Uniform Act fails to disclose any provision for the inclusion of the description of the chattels except by the inference to be drawn from Section 10 thereof.

Under that Section the filing officer is required to enter, "A brief description of the goods".

Both New York and Pennsylvania enacted such provision verbatim into their respective statutes.

***That Provision Is Still the Law in Pennsylvania but
Not in New York.***

In 1930 the legislature of the State of New York amended the provisions of the Personal Property Law affecting conditional sales, omitting the reference to, "A brief description of the goods" (Section 70 of the Personal Property Law).

In one of the foot-notes to the Circuit Court's opinion, a statement is made to the effect that the changes in the New York State Law may or may not have been designed to affect the earlier Uniform Act and "need not be considered here".

On the contrary, the Court referred specifically in its foot-note to the amendment of the New York Statute (Section 64a) enacted in 1941. By that amendment, it is specifically required that in the sale of chattels, not for commercial purposes, and not exceeding the sum of \$1500., a description of the chattels must be included in the contract.

Counsel respectfully submits that it is important to consider this amendment because it indicates clearly that the legislature of the State of New York considered the question of incorporating a description and affirmatively stated that only in such instance should a description be required.

Counsel, therefore, respectfully submits that the Circuit Court erred in intimating or inferring that by the 1930 change in the New York State Conditional Sales Act the legislature merely omitted, without affirmatively intending so to do,—the requirement for description.

With this distinction pointed out, it certainly cannot be said that the Conditional Sales Act of Pennsylvania or any decisions based thereon can be used as a precedent in the case at bar.

The Circuit Court in its opinion said, "APPLYING THE UNIFORM ACT, AS ADOPTED IN PENNSYLVANIA IN 1925 * * *".

Certainly any application of the Uniform Act as adopted in Pennsylvania has no bearing on this case.

Although the states of New York, Pennsylvania and Washington have in principle adopted the so-called Uniform Conditional Sales Act there are differences which are pertinent. Under the Uniform Act there is no specific provision requiring any description in a conditional sales agreement. The only provision therefor is the inference created under Section 10 thereof which requires the filing officer to enter in his book a brief description of the goods. That Section was enacted bodily into the statute in the State of New York when the Uniform Act was adopted. However, in 1930 the legislature of the State of New York amended its statute by omitting therefrom any reference to description even by inference. This was not an oversight on the part of the legislature because in 1941 it further amended its statute requiring a description only with respect to conditional sales agreements involving less than \$1500. and covering chattels not used for business or commercial purposes. Such is the present state of the law in New York.

Pennsylvania likewise enacted Section 10 of the Uniform Act bodily into its statute. There has been no amendment in that State and the decision in the case of *In Re: Mineral Lac Paint Co., supra*, is predicated upon such unamended statute.

The State of Washington has likewise adopted the Uniform Act, but it never included therein any requirement for description, even by inference.

It is therefore apparent that as neither New York nor Washington now require a description while Pennsylvania does require such description, that the Pennsylvania statute

and the decisions thereunder are not applicable in the State of New York.

On the other hand, in jurisdictions in which there is no requirement for description in the statutes AND EVEN IN SOME WHERE THERE IS, the Courts have uniformly held that where the contract contains "The key to the description" or "suggests a course of inquiry which if followed would supply the description" that the conditional sales agreement is valid and binding.

Attention is called to the following cases in support of this theory from all sections of the country:

Tilton v. H. M. Wade Co., C. C. A. 4th 2 Fed. 2d 358;

A. S. Thomas Furniture Co. v. T. C. Furniture Co., 120 Ga. 879; 48 S. E. 333;

Kammeier v. Chauvet, 171 N. W. 185;

G. A. Granger v. Cooper, 152 N. W. 304;

Smith Typewriter v. Grace, 115 Pac. 1019;

Rogers v. Whitney, 99 Atl. 419;

Stoll v. Schneider, 13 S. W. 2d 325.

The Court will note that these decisions are from north, south, east and west.

This is true particularly in the case of *Diamond Iron Works v. Werley*, *supra*. In that case the facts are identical AND SO IS THE LAW OF THE STATE WHICH WAS THE SITUS OF THE TRANSACTION, PARTICULARLY IN THAT THAT STATE REQUIRED NO DESCRIPTION.

The contract in the case at bar did contain "the key to the description" in that it placed the world upon notice that by making inquiry of either of the parties to the contract, description could be ascertained. Within the meaning of the cited cases that is sufficient.

Another compelling reason for granting the Writ herein requested is that if the decisions of the Circuit Court below should prevail, a serious miscarriage of justice will ensue.

A considerable sum of money is concededly due to the petitioner herein from the bankrupt and equity requires that in all justice the petitioner be protected therein.

CONCLUSION.

The Writ prayed for should be granted.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari issue under seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit commanding said Court to certify and send to this Court a full and complete transcript of the records and the proceedings of the Circuit Court of Appeals had in said proceeding, to the end that this proceeding may be reviewed and determined by this Honorable Court as provided by the statutes of the United States, and that the order herein of said Circuit Court of Appeals be reversed by this Honorable Court and for such further relief as to this Court may seem just and proper.

EMPIRE STATE CHAIR CO., INC.

By HYMAN DAVIDSON

Petitioner.

HAROLD FORSTENZER—*Counsel.*

UNITED STATES OF AMERICA,
STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

HYMAN DAVIDSON, being duly sworn, deposes and says: I am the President of the EMPIRE STATE CHAIR CO., INC., the petitioner in the above entitled proceeding. I have read the foregoing petition and the same is true as I verily believe. I further state the reason this verification is made by me and not by the petitioner is because the said petitioner is a domestic corporation and that I am the officer thereof, to wit: its President.

HYMAN DAVIDSON.

Sworn to before me this
18th day of April, 1944.

JOSEPH NEWMAN

Notary Public, Kings Co. No. 188, Reg. No. 115-N-5
Cert. filed in N. Y. Co. No. 229, Reg. No. 140-N-5
Commission expires March 30, 1945

I hereby certify that I have examined the foregoing petition for a Writ of Certiorari and in my opinion such petition is well founded and should be granted by this Honorable Court, and said petition is not presented for purposes of delay.

HAROLD FORSTENZER.

UNITED STATES OF AMERICA,
STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

HAROLD FORSTENZER, of the County of New York, in the City of New York, being duly sworn, on his oath, says, that he is the attorney for the above petitioner, and has been such since the beginning of the litigation involved herein and is entirely familiar therewith, and that the amount in controversy herein is the value of the chattels which are the subject of this proceeding determined by the Circuit Court of Appeals for the Second Circuit to be the property of the trustee respondent to wit: the sum of \$5800., exclusive of interests and costs.

HAROLD FORSTENZER.

Sworn to before me this
18th day of April, 1944.

JOSEPH NEWMAN

Notary Public, Kings Co. No. 188, Reg. No. 115-N-5
Cert. filed in N. Y. Co. No. 229, Reg. No. 140-N-5
Commission expires March 30, 1945